In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1420

JOSEPH F. YOUNG, PETITIONER

v.

ADA M. SCOTT, ET AL. and UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a) is reported at 421 F. 2d 143. The opinion of the district court (Pet. App. 4a) is reported at 307 F. Supp. 1005.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a) was entered on January 16, 1970. The petition for writ of certiorari was filed on April 13, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether the court of appeals was correct in its finding that 42 U.S.C. 1981 guarantees to Negroes the same right to purchase admission to a recreational area as is enjoyed by white citizens.

(2) Whether the court of appeals was correct in its finding that exclusion of Negroes from petitioner's recreational facility violated that portion of the Civil Rights Act of 1964 which bars racial discrimination at places of entertainment.

STATUTES INVOLVED

Pertinent excerpts from the Civil Rights Act of 1866 and the Civil Rights Act of 1964 are set forth at pages 3-4 of the petition.

STATEMENT

This action was commenced in October 1965 by Negro citizens who sought an order enjoining petitioner from operating his outdoor recreational facility (known as "Timberlake") on a racially discriminatory basis in violation of Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a. Timberlake is a twenty-three acre operation in suburban Virginia, which offers swimming, canoeing, fishing and picnicking to some sixty-five thousand persons each season, who pay an entrance fee of fifty cents to one dollar and a quarter and may rent equipment for an additional charge.

The United States intervened in the suit in October 1966, in support of the private plaintiffs. A con-

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sent decree, premised on the presence of an eating facility within Timberlake and the resulting application of the Civil Rights Act of 1964, was entered on December 5, 1966, enjoining petitioner from further discrimination (Pet. App. 1a). After entry of the injunction, the eating facility was closed and the discrimination continued. In August 1968 the United States moved for supplemental relief, alleging that, even without the eating facility, petitioner's continued policy of racial discrimination violated the Civil Rights Act of 1964. The government contended that Timberlake was a place of entertainment within the meaning of 42 U.S.C. 2000a(b)(3). The Negro plaintiffs filed a motion for supplemental relief contending that petitioner's policies violated 42 U.S.C. 1981 and 1982. The district court granted both motions, basing its decision on *Daniel* v. *Paul*, 395 U.S. 298; *Miller* v. *Amusement Enterprises, Inc.*, 394 F. 2d 342 (*en banc*), and *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (Pet. App. 7a-8a). The court of appeals affirmed, invoking the same authority (Pet. App. 14a-15a).

ARGUMENT

Petitioner has operated Timberlake on a racially segregated basis at least since the effective date of the Civil Rights Act of 1964 (Pet. App. 6a). For white members of the general public, admission to Timberlake is secured by presenting oneself at the admission booth and paying the requisite fee (Pet. App. 6a). Negroes and other nonwhite persons are routinely excluded (Pet. App. 6a). Petitioner main-

tains that he has a "common law" right to limit admission to white persons, and that his prerogative to do so is unaffected by any congressional enactment now in effect. He submits that the court of appeals erred in interpreting 42 U.S.C. 1981 to prohibit his arbitrary exclusion of Negroes from Timberlake and, further, that the court of appeals also erred in finding that Timberlake was a "place of exhibition or entertainment" under the 1964 Civil Rights Act and, therefore, subject to the anti-discrimination provision of that act.[1]

1. The court of appeals correctly construed 42 U.S.C. 1981 to prohibit racial discrimination by petitioner in the operation of the Timberlake recreational park. There can be no doubt that purchase of an admission ticket to Timberlake sets up a contractual relationship between petitioner, as proprietor, and the purchaser. See, *e.g.*, *Marrone* v. *Washington Jockey Club*, 227 U.S. 633, 636; *Williams* v. *Kansas City, Missouri*, 104 F. Supp. 848, 859 (W.D. Mo.), affirmed, 205 F. 2d 47 (C.A. 8), certiorari denied, 346 U.S. 826. In light of this Court's decisions in *Jones*

[1] Petitioner also suggests that the district court's decision amounted to an improper reopening of a final judgment. He says that the change in decisional law which occurred between 1966 and 1969 cannot serve as a basis for the supplemental relief which was granted. The district court, however, properly held that the consent decree was a judicial act possessing the same force and character as a nonconsensual judgment, see, *e.g.*, *Pope* v. *United States*, 323 U.S. 1, 12; *United States* v. *Swift & Co.*, 286 U.S. 106, 115, and that supplemental relief, upon the grounds stated, could be appropriately granted. See *System Federation* v. *Wright*, 364 U.S. 642, 651; *United States* v. *Swift & Co.*, *supra* at 114-115.

v. *Alfred H. Mayer Co.*, 392 U.S. 409 and *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, it is equally clear that petitioner's racially discriminatory admission policy deprives Negroes of the rights secured by 42 U.S.C. 1981.

That statute, in pertinent part, provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens." In *Jones* v. *Alfred H. Mayer Co.*, 42 U.S.C. 1982 [2] was held to prohibit private, racially motivated refusals to sell real property. In so ruling, the Court stressed that the 1866 Act "was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute * * *." 392 U.S. at 426. It is of course unnecessary to decide here whether every transaction or relationship which could formally be characterized as "contractual" brings Section 1981 into play. Thus, it may well be that membership in a *bona fide* private club—not involved here—and other purely social or personal arrangements are beyond the intended reach of the statute. Our present submission is only that ordinary commercial contracts are covered, including those relating to privately-owned places of *public* accommo-

[2] Section 1982 gives to Negroes the same right to "purchase [and] lease * * * real and personal property" as is enjoyed by white citizens. Like 42 U.S.C. 1981, § 1982 was derived from Section 1 of the Civil Rights Act of 1866. Act of April 9, 1866, c. 31, § 1, re-enacted by § 18 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, § 18, 16 Stat. 140, 144 and codified in Sections 1977 and 1978 of the Revised Statutes of 1874, now 42 U.S.C. 1981 and 1982.

dation, which—except for the race barrier—admit all persons indiscriminately. See *Valle* v. *Stengel*, 176 F. 2d 697 (C.A. 3). Cf. *United States* v. *Medical Society of South Carolina*, 298 F. Supp. 145, 152 (D.S.C.); *Dobbins* v. *Local 212, International Brotherhood of Electrical Workers*, 292 F. Supp. 413, 442 (S.D. Ohio). By excluding nonwhites from Timberlake, petitioner has impaired the right of Negroes "to make and enforce contracts" on the same basis as white persons and has, therefore, violated § 1981.

2. The court of appeals was also correct in its finding that petitioner's exclusion of Negroes from Timberlake violated Section 201(a) of Title II of the 1964 Civil Rights Act, 42 U.S.C. 2000a, *et seq.* Sections 201(b)(3) and 201(c)(3) of the 1964 Civil Rights Act, taken together, prohibit the proprietor of "any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment" which "customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce," from discrimination on the ground of race or color. 42 U.S.C. 2000a(b)(3), 2000a(c)(3). Petitioner maintains that he is not governed by this Act because Timberlake is not a place of "exhibition or entertainment" under sections 201(b)(3) and 201(c)(3) since his facility has no "sources of entertainment" which move in commerce.

This Court considered and rejected these same arguments in *Daniel* v. *Paul*, 395 U.S. 298. Here, as in that case, the petitioner provides recreation and entertainment for interstate travelers (Pet. App.

7a). Moreover, included among the "sources of entertainment" which petitioner makes available for his customers, are recreational equipment and apparatus (*e.g.*, canoes and umbrellas) which were purchased out of state (Pet. App. 6a). In *Daniel* v. *Paul*, when dealing with a recreational facility similar to Timberlake, this Court said:

> In light of the overriding purpose of Title II "to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public," H.R. Rep. No. 914, 88th Cong., 1st Sess., 18, we agree with the *en banc* decision of the Court of Appeals for the Fifth Circuit in *Miller* v. *Amusement Enterprises, Inc.*, 394 F. 2d 342 (1968), that the statutory language "place of entertainment" should be given full effect according to its generally accepted meaning and applied to recreational areas.

395 U.S. at 307-308. This Court further held:

> The legislative history indicates that mechanical sources of entertainment such as these [boats, juke box and phonograph records] were considered by Congress to be "sources of entertainment" within the meaning of § 201(c)(3).

Id. at 308. Plainly, as the court of appeals found, this holding is also controlling here.

The decision below is not, as petitioner suggests, and unwarranted expansion of this Court's previous rulings. Indeed, the court of appeals correctly conceived the action as presenting questions already resolved by this Court, and, therefore, properly invoked

both *Jones* v. *Alfred H. Mayer Co.* and *Daniel* v. *Paul.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1970.

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